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BOARD OF DENTAL EXAMINERS

December 12, 1991

Honorable Dan Morales
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RD-266

DEC 13 91
Opinion Committee

RE: Expedited Formal Opinion Request

Dear General Morales:

The Texas State Board of Dental Examiners is considering the adoption of infection control rules, pursuant to the authority granted it under Article 4551d(c), V.T.C.S. As a part of the Board's discussion and public hearing on these proposed rules, a question has arisen which is pertinent to the proposed adoption on January 16th - 17th of two of these rules.

The question submitted for an expedited formal opinion is:

Does the State Board of Dental Examiners have authority under its statute (or other pertinent statutes, including HB 7, 72nd Legislature, First Called Session) to establish a committee or advisory, expert panel for the confidential review of continued duties of an HBeAg, HIV positive, or AIDS dental health care worker? Concomitantly, in establishing such committee or panel, does the agency have authority to require that an infected worker report to such panel his or her HIV or HBeAg status for the purpose of determining which invasive procedures, if any the worker may continue to perform?

Discussion:

During the 72nd Legislature, Regular Session, the Dental Practice Act was modified to include the above-referenced section which directed the Board to investigate the issue of infection control. It also permitted the Board to write rules to control the spread of infection in the practice of dentistry. While HBeAg is included in the proposed infection control rules, the issue of confidentiality has arisen in relation to the HIV or AIDS dental health care worker and thus, prompted this opinion request.

**ACCOMPANIED BY ENCLOSURES —
FILED SEPARATELY**

In our initial research, discussion with authorities in other states, and with infection control experts at both the national and state levels, we recognized the necessity of a process to protect confidentiality and at the same time address the extent of invasive procedures an infected dental health care worker might perform in the interest of public health and safety. We recognized further that HB 7 stated that associations and health facilities "should" establish "guidelines" for panels, but it did not address the establishment of such panels. Two issues that appear to result from lack of legislative guidance are as follows.

First, associations and facilities are vested with no state disciplinary or oversight authority of licensees. Should an association-based panel review a dental health care worker as prescribed in HB 7, questions arise as to preservation of confidentiality and determinations of panel competency. Further, if such information is transmitted to the agency, the agency has no basis or means to deal with such information.

Second, to respond, simply, to a complaint through the prescribed "18c" process, or subsequently, a formal administrative hearing, appears to preclude confidentiality through public record. Moreover, these more formal actions might not be indicated by the nature of the complaint being that the dental health care worker was performing procedures while being either HBeAg positive, HIV positive, or AIDS confirmed, with no alleged violation, *per se*, of the Dental Practice Act having occurred.

To protect the public interest and to comply with confidentiality laws, a committee or "expert review panel" as referenced by the Centers for Disease Control guidelines was considered. At approximately the same time, HB 7 was passed which provided that "associations and health care facilities" establish guidelines for such panels. Thus, the term "expert review panel" was considered through consistency of language, and in accord with the authority provided under Article 4547a, V.T.C.S.

Concerns have been raised that the panel itself, made up of leading experts and the person's personal physician, is a potential violation of confidentiality. In fact the intent of the proposed rules is to protect such, to attempt to protect the public before rather than after the fact and to leave the Board in a position to render a decision should a later violation of reporting or universal precautions occur.

To date, we have had three complaints made that involve dentists who may be HIV positive or have AIDS. In one instance the dentist was AIDS confirmed and elected to retire the practice. In two other instances, we were unable to obtain records or further information regarding the individuals' status. As far as we know, these individuals continue to practice.

The enclosed proposed rules are undergoing non-substantive modifications as a result of our hearing. The comments we received included the Texas Department of Health and an expert in oral pathology from one of the dental schools. The Texas Dental Association testified as well. Their

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written comments indicate support of the two rules enclosed, although the written comments did not support requirements for sterilization procedures and barrier techniques comparable to those set out by the Centers for Disease Control, OSHA, and HB 7. Without sterilization rules, however, the two rules in question are of little or no value in tracking and disciplining subject licensees.

Again, we are requesting expedited review of this matter for Board determination at its January meeting. The Board's expressed intent is for the interest of public health and safety in keeping with its statutory directive for dentistry.

Thank you.

For the Texas State Board of Dental Examiners



C. Thomas Camp
Executive Director

c: Dr. Roger P. Byrne, D.D.S., M.D., President
Mr. Allen Halbrook, General Counsel, TSBDE
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